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IN THE

Supreme Court of the United States

REMON LEE,

Petitioner,

vs.

MICHAEL KEMNA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When state law provides both fair notice of the existence of a procedural rule and a reasonable opportunity to comply, is the state's default rule rendered "inadequate," for the purpose of subsequent federal habeas review, by occasional state-court cases which deny defaulted, meritless claims on the merits rather than invoking the default rule?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, petitioner has asked this Court to declare a Missouri state procedural rule "inadequate" to support the state court's judgment. The test of adequacy that petitioner asks this Court to use would cause widespread disregard of state

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

rules of procedure in federal habeas cases. The resulting destructive impact on the finality of criminal judgments and the integrity of the state's judicial process would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Steve Shelby was murdered on August 27, 1992, in Kansas City, Missouri. Witnesses identified Reginald Rhodes as the triggerman and petitioner Remon Lee as the getaway driver. J. A. 124-125 (state appellate court opinion, unpublished). Rhodes pled guilty. J. A. 38. Three members of Lee's family were going to testify that he was in California with them on the day of the murder, but when the time came for them to testify, they could not be located. J. A. 125. Defense counsel made an oral motion for a continuance, which was denied. J. A. 20-22.[2]

Defendant was convicted of first-degree murder. J. A. 124. He moved for a new trial, claiming denial of the continuance was error but giving no explanation for the witnesses' disappearance and claiming no federal constitutional violation. J. A. 31-32. The trial court entered judgment. J. A. 42-43.

While the direct appeal was pending, Lee moved for post-conviction relief in the trial court. That court appointed counsel, who filed an amended motion. J. A. 68. The court denied relief. J. A. 67. On the issue of denial of the continuance, the court held this was a question for the direct appeal, not post-conviction. J. A. 70.

The Missouri Court of Appeals affirmed both the conviction and the denial of post-conviction relief. J. A. 122.

On the continuance issue, the court first noted that the motion was not in writing accompanied by an affidavit, and

2. Further details on the circumstances of the motion are provided in the Brief for the States of Nebraska et al. as *Amici Curiae*.

there was "no indication of the State's consent to this deviation, as is required by [Missouri Supreme Court] Rule 24.09." J. A. 126-127. However, the court went on to "assum[e] *arguendo* that the oral motion was sufficient" but held "appellant's argument still fails." J. A. 127. The motion failed to set out the required elements under Missouri Supreme Court Rule 24.10, and this was sufficient to sustain the denial on appeal. J. A.127 (citing *State* v. *Morris*, 873 S. W. 2d 858, 871 (Mo. App. 1994)).

Petitioner filed his federal habeas petition on January 16, 1998. J. A. 132. The continuance issue was Ground 6. J. A. 213. Petitioner submitted affidavits from his three alibi witnesses stating that they had left the courthouse the day of the trial because a court officer had told them they would not be needed until the next day, J. A. 172, 174, or, in one affidavit, simply that "those people in Missouri" had said so. J. A. 169. The District Court found that 28 U. S. C. § 2254(e)(2) applied to these allegations. J. A. 215. That subsection forbids an evidentiary hearing when petitioner failed to develop the factual basis of his claim in state court, with certain exceptions. The court noted that the factual basis, statements of his own family, was available to petitioner at all times, and that none of the exceptions applied. J. A. 215.

The District Court held that the claim was procedurally defaulted. J. A. 217. The District Court also denied petitioner's Rule 60(b) motion and a certificate of appealability. J. A. 231. The Court of Appeals granted a certificate of appealability limited to "the question of whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance." J. A. 232.

The Court of Appeals held that the claim was procedurally defaulted. *Lee* v. *Kemna*, 213 F. 3d 1037, 1038 (CA8 2000) (*per curiam*), J. A. 234. Immediately preceding this holding is a quote from *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991), noting the requirements that the state procedural ground be adequate and independent, so this holding constitutes a rejec-

tion of the dissent's claim that the state ground was inadequate. The dissenting judge concluded, on the other hand, "The circumstances in which Lee moved for a continuance make it particularly unlikely that he could be *deemed to have been apprised* of the applicability [of] Rules 24.09 and 24.10." *Id.*, at 1045, J. A. 247 (emphasis added). The full Eighth Circuit denied rehearing en banc, two judges dissenting. J. A. 258.

SUMMARY OF ARGUMENT

This Court has used a variety of phrases over many years to describe when a state ground is "adequate" or "inadequate" to preclude federal court review of an issue. These phrases form a haphazard patchwork that has drawn considerable scholarly criticism. A coherent formulation, which takes into account the underlying policies and is consistent with the results of nearly all the precedents, is both desirable and possible.

The correct rule, *amicus* submits, is one along the lines proposed by the late Professor Charles Alan Wright, et al. That is, the claimant should have notice that the rule exists and applies to his situation and should have a reasonable opportunity to present his federal claim. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, pp. 286-287, 392 (2d ed. 1996).

This formulation would give the states the proper latitude to form and enforce their own consistent set of procedural rules for the presentation of all claims, state and federal. At the same time, it would enable the federal courts to step in when state rules are manipulated to evade federal law, to discriminate against federal rights, or to facilitate invidious discrimination against disfavored groups.

Implications from previous cases that state rules must be "strict" or that they cannot be "discretionary" should be expressly repudiated. These statements create perverse incentives for states to create harsh regimes of rigid procedural

defaults and to discourage needed exceptions when justice requires them.

This formulation is consistent with the results of all the major precedents except *Henry* v. *Mississippi*. That case was wrongly decided at the time, and it was also based on since-overruled precedent. *Henry* has little value as precedent and should not prevent the formulation of a coherent standard.

Under any standard, state decisions which skip past a procedural default issue to deny, rather than grant, relief on the merits should not be deemed to be a failure to enforce the rule. Such action does open the individual case to federal review on the merits, but it does not detract from the procedural rule. As both this Court and Congress have noted, it is occasionally more efficient to skip a knotty procedural question and deny a patently meritless claim on the merits. States should not be penalized for doing the same.

ARGUMENT

I. "Reasonable opportunity" should be adopted as the test of adequate state procedural grounds, and the prior patchwork of confusing phrases discarded.

A. "An Untidy Area."

Justice Frankfurter once referred to habeas corpus as "an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Sunal* v. *Large*, 332 U. S. 174, 184 (1947) (dissenting opinion). Habeas in general has been cleaned up considerably since then, but "adequate and independent state grounds" remains an unkempt corner in need of "systematic consideration."

The problem of adequate and independent state grounds is common to state-prisoner habeas cases under 28 U. S. C. § 2254 and this Court's direct review of state judgments under 28 U. S. C. § 1257. See *Harris* v. *Reed*, 489 U. S. 255, 260-262

(1989). Most of this Court's precedents on the subject are in the latter category. These precedents span the entire twentieth century, and they form a haphazard patchwork, offering "Varying Rubrics" for defining inadequacy. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 582 (4th ed. 1996) (cited below as "Hart & Wechsler"). The phrases offered up include "without any fair or substantial support," *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 22 (1920), "arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the defendant "could not fairly be deemed to have been apprised of [the rule's] existence," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958), a rule not previously applied "with the pointless severity" of the present case, *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), "impos[ing] unnecessary burdens upon [federal] rights," *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 298 (1949), "more properly deemed discretionary than jurisdictional," *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969), "not strictly or regularly followed," *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964), and finally, whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Tel. Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925); *Parker* v. *Illinois*, 333 U. S. 571, 574 (1948) (quoting and following *Central Union*).

One scholar surveying the varying formulations declared that "the governing rules may be discerned less in what the Court has been saying than in what it has been doing." Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965). More than once, the Court has used broad language to declare a state ground inadequate and then refused to review a claim in a later case that would seem to come within that language, never explaining the apparent inconsistency.

Davis v. *Wechsler*, 263 U. S. 22, 23 (1923) involved a jurisdictional objection based on an executive order implement-

ing a federal statute. The objection was rejected by the state court on the ground that the objecting party had waived it by entering a general appearance, even though the pleading making the appearance clearly stated the objection. Justice Holmes, in often-quoted language, rejected the contention that this ground blocked Supreme Court review. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.*, at 24.

This statement seems to imply a sweeping authority to disregard state procedural defaults, so long as the objection is "plainly and reasonably made." The appellant in *Central Union*, *supra*, thought so. It had forfeited its constitutional claims, under well-established Illinois rules, by taking its appeal to the intermediate appellate court rather than the Illinois Supreme Court. 269 U. S., at 193-194. There was nothing unplain or unreasonable about its statement of its claims. Yet the Court held that the state procedural default ground was adequate, stating the "reasonable opportunity" standard quoted *supra*, at 6. The two cases were decided only two years apart. Both were unanimous. Eight Justices participated in both cases, including the authors of both opinions. Yet there is no explanation of why a claim that seems to come within the language of *Davis* was rejected in *Central Union*.

Henry v. *Mississippi*, 379 U. S. 443, 447 (1965) seemed to say that the test was whether the state rule served a "legitimate state interest."[3] In *Monger* v. *Florida*, 405 U. S. 958 (1972)

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3. We hedge with "seemed," because the *Henry* opinion is universally considered unclear. See Hart & Wechsler, *supra*, at 584 ("confusing"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4020, p. 288 (2d ed. 1996) ("surprisingly ambiguous"); Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 196, n. 39 ("puzzling"); Hill, *supra*, 65 Colum. L. Rev., at 984, n. 173 ("confusing"); *id.*, at 986, n. 174 ("unclear").

(*per curiam*), the defendant's claim had been barred by one of the rare procedural rules that appears to lack a legitimate interest. He had filed his notice of appeal too early, before formal entry of judgment, and not renewed it afterward. *Id.*, at 958-959 (Douglas, J., dissenting). The dissent quoted *Henry* to no avail. *Id.*, at 961-962. The Court's summary order merely states the claim is barred. See *id.*, at 958; see also Hart & Wechsler, *supra*, at 585-586 (citing *Monger* and other cases for "*The Demise of Henry*"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4028, pp. 396-397 (2d ed. 1996).

At times, the standard seems to appear out of nowhere. In *Henry*, *supra*, the Court declared that its "legitimate state interest" standard was based on settled law, 379 U. S., at 447, but this assertion is simply false. See Hill, 65 Colum. L. Rev., at 988; Wright, Miller, & Cooper, *supra*, § 4020, at 289 (cases cited do not support this statement); Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 899 (1994) ("remarkable remake of the . . . doctrine"). Similarly, *Barr* v. *City of Columbia*, 378 U. S., at 149, claimed that its "strictly or regularly followed" standard reflected established precedent. This is an overstatement, to put it mildly, see Hill, *supra*, at 962, n. 71, unsupported by the earlier cases. *Barr* cites four cases for this proposition, yet the word "strictly," which has been the source of much mischief since *Barr*, does not appear in the statement of the rule in any of the four. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 457, sets forth the novelty/fair notice standard. *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), and *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 301 (1964), quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964), is a summary reversal citing *Williams* v. *Georgia*, 349 U. S. 375 (1955) but not otherwise stating a test. *Williams* was a case of discriminatory use of a discretionary power, such that "the state court action in the particular circumstances is, in effect, an avoidance of the federal right." *Id.*, at 383. The "strictly" requirement in

Barr was a bolt from the blue, and, as discussed *infra*, at 13, one that can cause perverse results if taken literally.

In *Walker* v. *Birmingham*, 388 U. S. 307, 319 (1967), the Court described *Barr* as a case "where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar." If *Barr* itself had used these words, instead of its unprecedented and unnecessary "strictly" language, much confusion could have been avoided.

Some cases in the series reach eminently sensible results on their facts, entirely consistent with precedent, yet inexplicably assert indefensible and unprecedented rationales for them. *Sullivan*, *supra*, is the worst of this lot. The state ground was indeed inadequate because, as Justice Harlan explained in dissent, the appellant had no reason to believe that the procedure he followed was not in compliance. See 396 U. S., at 245-247 (applying the *Patterson* novelty standard). Instead of applying this well-established standard, the *Sullivan* majority made the breathtaking assertion that all rules involving the exercise of discretion are inadequate. See *id.*, at 234; see also *infra*, at 12-13 (quoting Wright, et al., critique of *Sullivan*). Although *Williams* v. *Georgia*, 349 U. S., at 389, also was based on the discretionary nature of the rule, it was the discriminatory use of that discretion, rather than the mere existence of discretion, that enabled federal review. See *id.*, at 383.

A single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims, and opening the door to federal relief when they do not. Respect for *stare decisis* also requires a standard consistent with the results in most of the precedents. That standard, *amicus* submits, can be formed by combining *Patterson*'s "fairly . . . apprised" with *Central Union*'s "reasonable opportunity." That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he

should have a reasonable opportunity to present his federal claim. See Wright, Miller, & Cooper, *supra*, § 4027, at 386-387, 392. Nothing more is required.[4]

B. Policy Reasons.

These are solid policy reasons for federal courts to respect the procedural rules of state courts. See *Coleman* v. *Thompson*, 501 U. S. 722, 745-747 (1991). In our federal system, state courts must necessarily adjudicate federal questions, because it would be impractical to remove every case with a federal issue to federal court. Practical considerations also preclude having two different sets of procedural rules: one for state issues and another for federal. See Wright, Miller, & Cooper, *supra*, § 4021, at 302. A single objection will often have both state and federal grounds, such as the hearsay rule and the Confrontation Clause. Having two different sets of rules for the time to raise a single objection would be chaotic.

On habeas corpus, there is an additional reason for recognizing and giving effect to state procedural default rules. The requirement that the petitioner first exhaust state remedies is a time-honored federal policy. See 28 U. S. C. § 2254(b), (c); *Ex parte Royall*, 117 U. S. 241, 253 (1886). Respect for state procedural default rules is necessary to " 'protect the integrity' of the federal exhaustion rule." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999) (quoting *id.*, at 853 (Stevens, J., dissenting)). Without the default rule, "a prisoner could evade the exhaustion requirement—and thereby undercut the values that it serves—by 'letting the time run' on state remedies." *Id.*, at 848.

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4. If trial counsel fails to use the reasonable opportunity, that may form the basis of an ineffective assistance claim, either as an independent claim or as "cause" for the default. That claim, in turn, must be presented to the state courts at the proper time, if one is provided. See *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000).

Balanced against these considerations are "the federal interests in protecting federal rights against bad procedure." Wright, Miller, & Cooper, *supra*, § 4021, at 302. Underlying many of the old cases is a strong, if unstated, suspicion of state-court hostility to the underlying federal law. It is not coincidental that the most sweeping statements come in cases of black defendants and the NAACP from the South at the height of the civil rights struggle. See Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 190; see also Glennon, 61 Tenn. L. Rev., at 885-902 (describing how state grounds doctrine shifted during the civil rights struggle and has since shifted back). Fortunately, this era is behind us, and has been for some time. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976). This is not to say the Court was wrong to do what it did in the 1960s. Great struggles may require drastic measures, but when the crisis is over we should return to the normal modes of procedure. See *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 109 (1866).

Conscious hostility is not the only danger to federal rights, however. Sometimes a generally fair rule can operate in an unfair manner in a particular case, cutting a party off without a realistic opportunity to make its case. See *Michel* v. *Louisiana*, 350 U. S. 91, 95 (1955). For example, *Hathorn* v. *Lovorn*, 457 U. S. 255, 262-263 (1982) involved a rule against raising new issues in a petition for rehearing. This is generally a fair and unobjectionable rule. In the particular case, though, the state court had salvaged a facially unconstitutional statute through drastic and unexpected surgery, see *id.*, at 258-259, thereby raising a different federal question from the one originally presented. As a practical matter, the petition for rehearing was the first opportunity to raise this claim. Federal rights need protection from an unreasonable refusal to make a needed exception to a normally fair rule.

Another situation which still arises on occasion is the inherently fair rule which is unfairly applied retroactively. A

state may legitimately specify *in advance* which of two possible remedies a claimant must pursue, but it cannot "bait and switch." See *Reich* v. *Collins*, 513 U. S. 106, 111 (1994). Similarly, there is a federal interest in protecting federal rights from unforeseeable applications of existing rules. See *supra*, at 9 (discussing *Sullivan*). A competent lawyer should be able to discern the contours of the rule with sufficient clarity that he or she knows what to do to safely preserve the claim. See *Walker* v. *Birmingham*, 388 U. S., at 320 (petitioners "on notice" of the correct procedure and not "entrapped or misled"). That does not mean that the boundaries of the rule must be so crisp that the lawyer can confidently skate on the edge. There are good reasons for rules to be flexible, see Wright, Miller, & Cooper, *supra*, § 4026, at 386, and flexibility necessarily creates fuzzy boundaries. It means that a procedure that appears to be in clear compliance cannot suddenly be declared to be a default.

However, there is *no* federal interest in compelling or even encouraging the states to purge all discretion from the operation of their procedural default rules. This is the perverse incentive of opinions such as the majority in *Sullivan* v. *Little Hunting Park, Inc.*, *supra*.

> "The possible implication in the Sullivan opinion that discretionary state grounds cannot provide adequate reason to refuse to consider a federal question is unwarranted. There are many valid reasons for framing procedural rules in general, 'discretionary' terms. Precisely defined rules cannot take account of the gravity of a procedural failure, the strength of the excuses offered, or the importance of the procedural and substantive consequences of excusing or punishing the failure. In many circumstances, appellate courts invest lower courts with discretion both because of a belief that a better decision will result, and because of a conviction that in any event the matter does not justify the institutional cost of plenary review. Although there is a modest risk that discretionary procedural sanctions may be invoked more harshly against disfavored federal rights, that

> does not warrant blanket disregard of state procedure. Instead, the discretionary nature of the state rule may be considered in applying the better tests of adequacy set out in the next section. If discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law, or to deny a fair opportunity to present federal claims, the state ground may be found inadequate." Wright, Miller, & Cooper, *supra*, § 4026, at 385-386.

Along the same line, there is no federal interest in denying effect to any state procedural rule which is not "strictly" applied in the sense of iron-clad severity. Again, such a formulation provides a perverse incentive for states to make their default rules more severe and less flexible than the state might otherwise choose. "The Court should continue to recognize that sound procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts." *Id.*, § 4028, at 403.

Dugger v. *Adams*, 489 U. S. 401 (1989) illustrates that this Court does not apply the "strictly" requirement literally. The dissent argued that the Florida Supreme Court had reached the merits in two other cases despite the same default, and therefore, under *Barr*, the state rule was inadequate. *Id.*, at 416-418 (Blackmun, J., dissenting). The majority rejected this argument, noting that the rule was applied in "the vast majority of cases." *Id.*, at 411, n. 6. The Court noted that even though the failure to clearly state the procedural default in a few cases would permit federal habeas review in those particular cases, it would not "undercut the adequacy" of the rule in general. *Id.*, at 412-413, n. 6.

No doubt in the mid-1960s there was a legitimate concern underlying the apparent distrust of discretionary or less-than-strict rules. That was the suspicion they were being used discriminatorily against federal rights, civil rights organizations, and black criminal defendants. See Glennon, 61 Tenn. L. Rev., at 895 (noting "state court efforts to use their

procedural rules to impede the civil rights movement"). In 2001, that possibility may not have vanished entirely, but it is a faint shadow of what it was in 1964. Today, the cure is far worse than the disease. Flexibility and discretion in the application of default rules should be encouraged, not discouraged.

If the state courts really did exercise discretion so as to discriminate on the basis of race or against fundamental rights, that would be a violation of the Equal Protection Clause by itself. A requirement of truly strict application could only be justified as a kind of conclusive presumption to relieve the claimant of the difficult burden of proving discrimination. Such presumptions should only be used where they produce the correct result most of the time. See *Coleman* v. *Thompson*, 501 U. S., at 737. Presuming discrimination from a lack of iron rigidity in the application of default rules would reach the wrong result nearly all of the time.

In general, then, the requirements of fair notice of the rule and its applicability and a reasonable opportunity to comply accommodate all the important policy considerations. Two supplemental rules should also be recognized to deal with unusual situations. A state rule should not be allowed to defeat the policy of a pertinent federal statute, and actual, invidious discrimination in the application of a state rule independently violates the Equal Protection Clause.

C. Consistency With Statute.

Our proposed rule is also consistent with the exhaustion statute, 28 U. S. C. § 2254(b). As discussed *supra*, at 10, one of the principal purposes of the procedural default rule is to prevent evasion of the exhaustion requirement. Where Congress has made an exception to the exhaustion requirement, there is nothing to evade. Conversely, excusing procedural default where Congress has not excused nonexhaustion would license evasion.

Exhaustion is excused when "circumstances exist that render [State corrective] process ineffective to protect the rights of the [habeas] applicant." § 2254(b)(1)(B)(ii). Failure of the state law to provide fair notice and a reasonable opportunity is such a circumstance. Discretion to excuse defaults is not. Application of the rule in other cases in a less than "strict" manner is not. So long as the path to compliance was marked and unobstructed, the process was not "ineffective." The attorney might have been, but that is a different issue. See *supra*, at 10, n. 4.

A "reasonable opportunity" test for "adequate" state grounds mirrors the statutory exception for the exhaustion rule. It is broad enough to prevent evasion of that rule without blocking claims exempted from the rule. This test is therefore more consistent with the exhaustion-protecting purpose of the procedural default rule than any of the existing alternative tests.

D. Consistency with Precedent.

As we noted earlier, respect for *stare decisis* requires that any restatement of the doctrine of adequate and independent state grounds be as consistent as possible with precedent. No coherent theory could possibly embrace the widely disparate language of the precedents, but it is possible to reconcile all but one of the major cases on their facts. "It is black letter law that the holding of a case is determined by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." *People* v. *Davis*, 7 Cal. 4th 797, 823, 872 P. 2d 591, 608 (1994) (Mosk, J., dissenting) (internal quotation marks omitted). Hence, consistency with the material facts is at least as important as consistency with the language.

First, we can put to one side those cases in which the state rule operates contrary to the policy of a federal statute or regulation. *Davis* v. *Wechsler*, 263 U. S. 22 (1923) belongs in this category. That case involved a suit against a railroad under federal control, and it was brought in violation of a federal executive order prescribing the venue of such suits. See *id.*, at

23; see also *Alabama & Vicksburg R. Co.* v. *Journey*, 257 U. S. 111, 112-114, and n. 1 (1921) (quoting and upholding the order). The purpose of the order was to divest the court of authority to hear the case at all, so the policy considerations supporting respect for state procedure, see *supra*, at 10, diminish to the vanishing point. It would defeat the policy of the order and the statute it implemented to allow a minor misstep in local procedure to subject a federally controlled entity to suit in a court where the case never should have been. Taking a limited view of *Davis*, such as this one, is necessary to reconcile it with *Central Union Tel. Co.* See *supra*, at 6-7.[5] *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294 (1949) can be considered in the same special class. "*Brown* did not involve a pleading problem at all but rather a misconception by the state court as to the governing substantive [federal statutory] law." Hill, *supra*, 65 Colum. L. Rev., at 973.

The federal statute cases aside, we turn to the facts of other cases. The easiest cases are those where the state rule, as applied, is so grossly unfair as to violate due process. *Reece* v. *Georgia*, 350 U. S. 85 (1955) is the exemplar of this group. The indigent defendant's time to challenge the composition of the grand jury expired before counsel was appointed. See *id.*, at 89-90. This is obviously not a reasonable opportunity to state his federal claim, however clearly established the rule might have been.

Cases involving new rules unfairly applied retroactively fit with our proposed requirement of fair notice. These include *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991), *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988) (state case law at the time of the "default" indicated that the procedure defendant used was proper), and *NAACP* v. *Alabama ex rel. Patterson*,

5. An alternative limited view of *Davis* is that the state court's procedural ruling was novel and surprising. See Hill, *supra*, 65 Colum. L. Rev., at 975-976. If Professor Hill is correct, the *Davis* holding on its facts is consistent with our proposed general standard.

357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677-678 (1930) found that the retroactive application of a new rule defaulting the federal claim was a due process violation, so this case fits both categories.

Closely related are those cases where the state rule was clearly established before the "default," but the procedure followed by the federal claimant appeared to be in compliance with the rule as applied up to that time. These include the infamous *Rogers* v. *Alabama*, 192 U. S. 226, 229-230 (1904) (two-page motion stricken as "prolix"), *Sullivan* v. *Little Hunting Park*, discussed *supra*, at 9, and *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). In *Barr*, the state court had held that the objection was "too general to be considered." *Ibid.* Yet, this Court noted, in four other nearly contemporaneous cases, the state court had considered equally general objections and, significantly, had *granted* relief in two of those cases. See *ibid.* We will explain in part II, *infra*, why cases granting relief are more significant than cases reaching the merits but denying relief. In *James* v. *Kentucky*, 466 U. S. 341, 346-347 (1984), the preexisting case law was too confused to give fair notice that defendant had to ask for an "instruction" rather than an "admonition" under the circumstances. In *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the Court noted "a long line" of decisions permitting motions like the defendant's.

Finally, there are the cases where the rule as applied denies a reasonable opportunity to present the federal claim, however well established it may be and however fair it may be in most cases. *Hathorn* v. *Lovorn*, 457 U. S. 255 (1982) illustrates this category. The petition for rehearing in that case was the first opportunity to present the federal question as a practical matter. See *supra*, at 11. Regardless of whether the state rule against raising new issues on petition for rehearing violated due process as applied, the plaintiffs did not have a fair opportunity to present their claim, and hence the state ground was not ade-

quate to bar federal review. In *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 23 (1920), the "coercive means" used by local authorities to illegally tax exempt Indian land had left the Indians with no reasonable opportunity to make the prepayment challenge the state required.

The one case that cannot be reconciled on its facts is *Henry* v. *Mississippi*, 379 U. S. 443 (1965). That case involved a contemporaneous objection rule. *Id.*, at 445-446. The defendant did not object to certain evidence when it was introduced, although he did later. *Ibid.* The actual holding of this confusing case was to remand to the state court with an invitation to adopt the "deliberate bypass" standard of *Fay* v. *Noia*, 372 U. S. 391 (1963) for its own procedural default rule. See *Henry*, *supra*, at 453.[6]

Henry's deficiencies were obvious at the time and were cataloged in Justice Harlan's dissent, *id.*, at 457-465, and Professor Hill's article, *supra*, 65 Colum. L. Rev., at 982-991. Today, there are additional reasons the Court should not be too concerned with *Henry* as precedent. The decision itself is routinely ignored. See *supra*, at 7-8. Most importantly, though, *Henry* is heavily dependent on *Fay* v. *Noia*, which has since been overruled. See Wright, Miller, & Cooper, *supra*, § 4020, at 282, 291. At this point, *Henry* has so little value as precedent that it should not prevent the formulation of a coherent standard.

In summary, a coherent standard of "adequate" state grounds is needed to replace the existing patchwork for state procedural default rules. A requirement of fair notice that the rule exists and applies and a reasonable opportunity to present the claim embraces the important policy considerations and is

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6. The state court declined the invitation, this Court denied certiorari, superfluously adding that the denial was without prejudice to habeas relief, and Henry did obtain habeas relief. See Glennon, 61 Tenn. L. Rev., at 898-899.

consistent with all the major precedents, except for one case that should no longer be considered a valid precedent.

II. State cases which deny defaulted claims on the merits should not be deemed failures to enforce the rule.

Petitioner cites a number of Missouri cases in which the state courts "reached the merits" despite procedural defaults similar to the present case. Brief for Petitioner 31. However, all of these cases denied the appellant's claim. *Ibid.* Under the test proposed by Professor Wright and colleagues and urged in part I of this brief, these cases would be irrelevant. A rule clearly stated in the rules of court and frequently enforced, as described in respondent's brief, provides fair notice of its existence.

Even if the "strictly or regularly followed" test survives, however, there is an important distinction which has so far been overlooked. There is a major difference between skipping past a default issue to *deny* a claim on the merits and excusing a default to *grant* a claim on the merits.

As discussed *supra*, at 13-14, the "strictly or regularly followed" test has its roots in the suspicion of discrimination against disfavored claims or parties. In order to have a disfavored group, there must be a favored group. A court which skips past a default issue to deny the claim on the merits has not done the party much of a favor. Such a decision does open the door to federal review on the merits, but relief remains a very remote possibility. This Court denies all but a tiny fraction of certiorari petitions. See R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 36 (7th ed. 1993). For nearly all civil cases, the state court decision is final. Federal habeas is only available in criminal cases if the petitioner is still in custody when the petition is filed, after exhausting state remedies. See *Maleng* v. *Cook*, 490 U. S. 488, 492 (1989) (*per curiam*). As a practical matter, that excludes virtually all misdemeanors and many lower-grade felonies. About 99% of

federal habeas petitions were denied even before enactment of the present 28 U. S. C. § 2254(d). See V. Flango, Habeas Corpus in State and Federal Courts 61 (National Center for State Courts 1994) (1609 denied in sample of 1626). Today, a state court decision on the merits further reduces the chances of federal habeas relief. See *Williams* v. *Taylor*, 529 U. S. 362, 410-411 (2000). In short, nearly all claimants who are denied relief by state courts will not obtain it from federal courts either, regardless of whether the denial is on procedural grounds or on the merits. Therefore, denying a claimant relief on one ground rather than another is not the kind of discrimination that implicates the federal interests involved here.[7] Cf. *Williams* v. *Georgia*, 349 U. S. 375, 384-387 (1955) (noting similar cases in which relief was granted).

When the responding party contends that a claim is both meritless and defaulted, a court may have sound reasons for denying it on the merits rather than deciding the default issue. When the moving party must clear multiple hurdles to obtain relief, there is generally no requirement to decide the issues in any particular order. Once it is clear that the moving party cannot clear one hurdle, there is usually no hard-and-fast requirement to decide any of the others. For example, *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) expressly endorsed the practice of denying ineffective assistance claims for lack of prejudice without deciding whether counsel's performance was deficient, whenever that is the easier route to decision.

Federal courts recognize an exception to the rule stated above for jurisdiction. Because the legitimacy of the decision of other issues depends on it, jurisdiction must be decided first. *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94-95 (1998). Procedural default issues can claim this priority

7. Imagine an employment discrimination complaint that alleges, "Plaintiff was fired for coming to work late, while similarly situated white employees were fired for leaving early." Not a compelling case.

when they are jurisdictional, such as direct review in this Court of state-court decisions. See *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992). When the default is not jurisdictional, the order of decision becomes discretionary.

The exhaustion rule is a procedural bar to relief which is not jurisdictional. See *Strickland*, 466 U. S., at 684. Congress has now authorized federal courts to deny but not grant unexhausted claims on the merits. 28 U. S. C. § 2254(b)(2). The reason is efficiency. Issues of exhaustion may be intertwined with issues of default, and the issues may be quite complicated, while habeas claims are often patently meritless on their face. Dismissal of a meritless claim as such may be the more efficient course.

Lambrix v. *Singletary*, 520 U. S. 518 (1997) addressed the order of consideration of procedural default issues. In federal habeas cases, these issues should ordinarily be decided before *Teague*[8] issues and the merits, but not invariably. *Id.*, at 525. "Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Ibid.* The *Lambrix* Court then proceeded to resolve the case on *Teague* grounds without answering the default question. *Ibid.*

There is absolutely no basis in reason or policy why a state rule should be branded as "inadequate" merely because the state courts occasionally take the same path that this Court took in *Lambrix* and that Congress authorized in § 2254(b)(2). Judicial economy in the state appellate courts is no small concern. For example, in the California Courts of Appeal in fiscal year 1997-98 there were 269 contested matters per authorized justice. Judicial Council of Cal., Court Statistics Report 25 (1999). That is 807 cases per three-judge panel per year, a heavy load. Once it becomes obvious that an appellant cannot clear one of

8. *Teague* v. *Lane*, 489 U. S. 288 (1989).

several hurdles in the path to relief, it would be a pointless waste of a scarce resource to decide whether he can clear the others.

Jimmy Swaggart Ministries v. *Board of Equalization of Cal.*, 493 U. S. 378 (1990) illustrates that dismissal of a meritless, defaulted claim on the merits does not render a state rule "inadequate." Swaggart challenged the taxation of religious materials before the Board on First Amendment grounds. *Id.*, at 382-384. The Board's rejection of this claim was affirmed on the merits by the state court and this Court. *Id.*, at 384, 397. In the state court, Swaggart also raised a claim under the Commerce Clause and a claim under the Ninth and Tenth Amendments, even though neither had been raised before the Board. See *Jimmy Swaggart Ministries* v. *State Bd. of Equalization*, 204 Cal. App. 3d 1269, 1290, 1292, n. 19, 250 Cal. Rptr. 891, 905, 907, n. 19 (1988). The state court denied the Commerce Clause claim as procedurally defaulted, *id.*, at 1292, 250 Cal. Rptr., at 906-907, and the Ninth/Tenth Amendment claim on the merits. *Id.*, at 1293, 250 Cal. Rptr., at 907-908.

On appeal, this Court rejected Swaggart's contention that California's procedural rule was "not 'strictly or regularly followed.' " 493 U. S., at 398-399. The rule was "adequate" even though "the Court of Appeal in this case . . . ignored the procedural bar and ruled on the merits of appellant's Ninth and Tenth Amendment arguments [citation] even though those arguments were likewise not raised" in the administrative proceedings. *Ibid.* The apparent reason the state court went to the merits of the latter arguments is that they were "singularly unpersuasive," 204 Cal. App. 3d, at 1293, 250 Cal. Rptr., at 907, and thus decision on the merits was more efficient than pondering the exceptions to California's administrative exhaustion rule. This Court in *Swaggart* brushed off the argument that the state court's choice had somehow rendered the rule inadequate, stating only that "appellant has failed to substantiate any claim that the California courts apply this

exception in *an irregular, arbitrary, or inconsistent manner*." 493 U. S., at 399 (emphasis added).

Swaggart thus tells us that "strictly or regularly followed" means not "irregular, arbitrary, or inconsistent." It further tells us that dismissing a meritless defaulted claim on the merits rather than on the default is not irregular, arbitrary, or inconsistent. A party claiming that a state rule is "inadequate" due to less-than-strict enforcement should have to show, at a minimum, that substantial numbers of other litigants are unfairly favored by having their claims reviewed *and granted* despite an indistinguishable procedural default.

CONCLUSION

To the extent it treated the state court's procedural default ruling as an "adequate" state ground, the decision of the Court of Appeals for the Eighth Circuit should be affirmed.[9]

July, 2001

Respectfully submitted,

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9. *Amicus* CJLF takes no position on the remaining issues in the case.